

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 18, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-2239

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

IN THE INTEREST OF RYAN D.D.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

RYAN D.D.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Winnebago County:
ROBERT A. HAASE, Judge. *Reversed and cause remanded with directions.*

NETTESHEIM, J. Ryan D.D. appeals from a juvenile court dispositional order which imposed and stayed his placement under the supervision of the Wisconsin Department of Corrections at Lincoln Hills. Ryan additionally appeals from an order revising that dispositional order and lifting the stay. Ryan argues that the written dispositional order conflicts with the juvenile court's oral

pronouncement at the dispositional hearing which withheld his placement at Lincoln Hills.

We conclude that the juvenile court expressly stated at the dispositional hearing that it was withholding placement at Lincoln Hills in favor of giving Ryan another opportunity to reform his behavior. Because the court's oral pronouncement controls, we reverse the dispositional order. Our holding also requires that we reverse the revised order which lifted the stay of Ryan's placement at Lincoln Hills. We remand for a further hearing as to whether and, if so, how the original order should be revised.

Ryan was adjudicated delinquent on October 16, 1996, after he admitted to allegations of battery contrary to § 940.19(1), STATS. Ryan's dispositional hearing was originally scheduled for December 16, 1996, but was delayed at Ryan's request until January 31, 1997. Ryan's attorney requested an adjournment in order to prepare a response to the State's and the Department's joint recommendation for placement at Lincoln Hills.

At the dispositional hearing on January 31, the State and the Department modified their original recommendation for Ryan's placement at Lincoln Hills, requesting instead that the juvenile court impose and stay a dispositional order placing Ryan at Lincoln Hills. Ryan objected to this request but agreed to a recommended comprehensive program which included intensive family counseling, involvement in a Second Chance School program and an anger management group. With respect to the recommendation that the juvenile court impose and stay a placement at Lincoln Hills, the court made the following statements:

I don't want to send you to Lincoln Hills if I don't have to, but that's the key—if I have to, I will.... Well, I'm thinking Lincoln in this case, but I'm willing to give you one more shot. Show me you can do it because I know you can.

Based upon a review of the documentations to which I have referred and based upon the statements made in the record today, the child is placed on formal supervision for a period of one year. *I will withhold an order to Lincoln at this time.* It's my belief that, if there's another violation, another battery or something like that, a new petition would be plenty of grounds to then invoke the sending to Lincoln Hills. [Emphasis added.]

The court then adopted the requirements of the comprehensive program as conditions of Ryan's supervision.

A written dispositional order was not immediately entered following the dispositional hearing. However, the clerk's minutes of the dispositional hearing confirm the juvenile court's statements. The minutes state, in relevant part, "w/hold order to Lincoln Hills at this time."

On February 12, 1997, the Department filed a petition seeking revision of the dispositional order and a change of placement.¹ Specifically, the Department requested that Ryan have "the withheld sentence to Lincoln Hills lifted" based on recent behavioral referrals at Ryan's high school, including a charge of disorderly conduct for lighting oregano in a classroom. At the time this petition was filed, a written dispositional order still had not been entered.

The juvenile court conducted a hearing on the Department's petition on February 17, 1997. Ryan again objected to placement at Lincoln Hills.

¹ An additional petition for revision of the dispositional order was filed on February 10, 1997, by Ryan's social worker. The petition requested that Ryan be removed from Neenah High School and ordered to attend Second Chance School. It does not appear that any action was taken upon this petition before the State's petition was filed seeking placement at Lincoln Hills.

However, after hearing arguments from both sides and testimony from Ryan's mother, the court found that Ryan had violated the dispositional order. The court stated that "the stay is lifted" and placed Ryan under the supervision of the Wisconsin Department of Corrections at Lincoln Hills. At the close of the hearing, the following exchange took place:

[RYAN'S ATTORNEY]: Your Honor, just a matter of housekeeping here. Can we review the minutes from the last hearing quickly because we never got a written order. I just want to make sure—was the Lincoln Hills—

THE COURT: Withheld order.

[RYAN'S ATTORNEY]: Withheld. Okay. Thank you.

THE COURT: It wasn't withheld. It was actually entered and execution stayed and placed on supervision—

A written order revising the original dispositional order was entered on February 17, 1997. This order recited, in relevant part, that "[t]he stay is lifted and the juvenile is placed under the supervision of the Wisconsin Department of Corrections, with placement at Lincoln Hills"

Two days later, on February 19, 1997, the juvenile court entered a written dispositional order regarding the original dispositional hearing. This order was made nunc pro tunc to January 31, 1997, the date of the original dispositional hearing. This written order recited that Ryan "is placed on formal supervision for one year with placement at Lincoln Hills imposed and stayed." Thus, the written order revising the dispositional order was entered before the written dispositional order was entered.

Ryan appeals, contending that the juvenile court should have construed the original dispositional order as one which withheld his placement rather than one which imposed and stayed his placement. As a result, he contends that the court simply lifted the stay and failed to recite adequate reasons for

placing him at Lincoln Hills. We take particular note that Ryan does not challenge the court's ruling that he was in violation of the rules of his supervision.

The central issue in this case is whether the juvenile court withheld the order for placement at Lincoln Hills or whether the order was imposed and stayed. Ryan argues that the transcript of the dispositional hearing and the minutes from that hearing demonstrate that the court intended to withhold the order. The State contends that although the court employed the word "withhold," such word has no legal significance under the new Juvenile Justice Code, ch. 938, STATS., which allows only for imposed and stayed dispositions. *See* § 938.34(16), STATS.² Because the court expressly stated that the order for placement at Lincoln Hills would be withheld, we reject the State's argument.

The law is clear: where a conflict exists between a court's unambiguous oral pronouncement of sentence and a written judgment, the oral pronouncement controls. *See State v. Perry*, 136 Wis.2d 92, 114, 401 N.W.2d 748, 758 (1987).³ Any uncertainty should be resolved in favor of the defendant. *See id.* Although the State points to additional statements made by the juvenile court at the revision hearing which characterize the placement as "imposed and

² Section 938.34(16), STATS., governs the dispositions of juveniles adjudged delinquent. This section provides in part:

STAY OF ORDER. After ordering a disposition under this section, enter an additional order staying the execution of the dispositional order contingent on the juvenile's satisfactory compliance with any conditions that are specified in the dispositional order and explained to the juvenile by the court.

³ We acknowledge that *State v. Perry*, 136 Wis.2d 92, 401 N.W.2d 748 (1987), involved an adult defendant in a criminal proceeding. However, we see no reason why this law should not similarly apply to a juvenile proceeding.

stayed,” a court’s later recollections regarding its intentions will not suffice to circumvent this rule. *See id.*

We conclude that the juvenile court’s oral pronouncement unambiguously withheld Ryan’s placement at Lincoln Hills. The clerk’s minutes of the proceeding support our interpretation of the court’s remarks. A portion of the court’s remarks at the revision hearing also confirm our holding. When the court was asked to check the clerk’s minutes at the revision hearing, the court first correctly stated that placement was withheld but then incorrectly added that “[i]t was actually entered and execution stayed”

The State correctly observes that the Juvenile Justice Code does not expressly contain a provision for withholding a placement. However, when a court chooses to not order placement, the court is functionally withholding such action. Moreover, the term is commonly understood in the criminal law. A withheld sentence is distinctly different from a sentence which has been imposed and stayed.⁴ Based upon the juvenile court’s unambiguous oral pronouncement, the court did not impose and stay Ryan’s placement at Lincoln Hills.

We reverse the original dispositional order. On remand, we direct that the order be amended to reflect the juvenile court’s actual disposition which withheld Ryan’s placement. We also reverse the order lifting the stay of Ryan’s placement at Lincoln Hills. We remand for a further hearing as to how the original dispositional order should be revised, if the juvenile court so chooses. Since Ryan does not challenge the juvenile court’s holding that he was in violation

⁴ BLACK’S LAW DICTIONARY 1363 (6th ed. 1990) defines a “[w]ithheld sentence” as a “[s]entence not imposed.”

of the conditions of his supervision, our mandate does not require a completely new hearing on the Department's petition for revision of the dispositional order. Instead, the hearing shall be limited to whether the juvenile court chooses to revise the dispositional order and, if so, in what manner.⁵

By the Court.—Orders reversed and cause remanded with directions.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.

⁵ In light of our holding, we need not address Ryan's additional argument that the juvenile court failed to make the requisite findings under § 938.34(4m), STATS., governing placement in a correctional facility and that the court failed to sufficiently explain why the violations of the conditions of supervision required placement in such a facility. See **Gross v. Hoffman**, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed). The court will have further opportunity at the remand proceedings to address these matters if the court chooses to revise Ryan's placement.

